United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 7, 2010

TO : Marlin O. Osthus, Regional Director
Region 18

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sheet Metal Workers Local 10
(Clear Channel Outdoor, Inc. Minneapolis division)
Case 18-CB-4896

This case was submitted for advice as to whether a multi-employer (Taft-Hartley) Union health insurance plan, in which a portion of the Employer's premium contribution goes to subsidize retiree benefits, including retirees of other employers, is a mandatory subject of bargaining.

We conclude that the plan is a mandatory subject of bargaining. Accordingly, the Union did not violate Section 8(b)(3) by bargaining to impasse over the plan.

FACTS

Background

Clear Channel Outdoor, Inc. is a global company involved in the rental of outdoor advertising space. Clear Channel Outdoor, Minneapolis Division (the Employer) is involved in the business of outdoor billboard advertising. The Union represents the Employer's field staff employees. The Union and Employer have been in a collective-bargaining relationship for over 25 years. The most recent collective-bargaining agreement was effective from December 2008, to December 2009.

The parties have been engaged in negotiations for a new collective-bargaining agreement since early November 2009, but have been unable to reach agreement. The final issue in negotiations is the unit employees' health insurance plan. The Union proposes to continue the existing health insurance plan[1], a Taft-Hartley multi-employer plan that has been in place for many years (the

[1] The Twin City Trade Area Sheet Metal Employees Benefit Fund.

"Union Plan").[2] The Union Plan contains a "dollar bank," which allows employees to bank any hours that they work in excess of 145 hours per month. The plan trustee records these hours and the employee can draw upon them during non-working periods such as layoffs, or after retirement. The Employer proposes to discontinue its involvement in the Union Plan and to cover unit employees in the Clear Channel Health Insurance Plan (the "Employer Plan"). The Employer Plan would, inter alia, remove retiree benefits for current employees and eliminate the dollar bank.

The negotiations

On November 2, 2009, the first negotiating session, the Union proposed that the Employer continue its involvement in the Union Plan. The Employer asked whether the Union Plan would require the Employer to fund benefits for retirees. The Union responded that it would, but was unsure of the exact amount. The parties also discussed the dollar bank. The Employer rejected the Union Plan and insisted that the Union agree to its plan. Following this meeting, the Employer made a formal information request for information about the Union Plan.

The next session, the Union rejected the Employer Plan because it would lead to the loss of hours banked by employees under the Union Plan and because it removed retiree benefits for current employees.

On December 16, the fourth session, the Employer claimed that the Union had to remove retiree benefits from the negotiating table or face a charge of bad-faith bargaining because it involved a permissive subject of bargaining. The Employer also reiterated its request for information regarding the Union Plan. In response to this inquiry, the Union provided a letter from the plan trustee stating that all information requests should be directed to the trustee and not the Union. The parties met again in February 2010,[3] but were unable to reach agreement on the health plan issue.[4]

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[2] The Region has determined that under the Union Plan, roughly $1 of the Employer's $4.50 per hour contribution to the Union Plan benefits current retirees, who may or may not have been employed by the Employer.

[3] Herein all dates are 2010 unless otherwise indicated.

[4] On February 18, the Employer filed an unfair labor practice charge alleging that the Union violated Section 8(b)(3) by bargaining to impasse over a non-mandatory subject and by refusing to provide relevant information

On April 1, the Employer submitted to the Union what it contended was its final offer, which included the Employer Plan. Shortly thereafter, the Union voted to reject the Employer's final proposal. On April 5, the parties spoke by phone with the FMCS Commissioner. The Union continues to reject the Employer Plan based on the impact that it will have on the dollar bank, and on the future retirement benefits of current employees.

The Region has concluded that the parties are at bona fide impasse.[5]

ACTION

Section 8(b)(3) provides that a Union violates the Act when it refuses to collectively bargain with the employer of the employees it represents. Section 8(b)(3) must be read in conjunction with Section 8(d), which expressly defines the bargaining obligation to include a requirement to confer in good faith. A party fails to bargain in good faith when it insists to impasse on a non-mandatory subject. Mandatory bargaining subjects are those that "settle an aspect of the relationship between the employer and employees."[6]

The health insurance and medical benefit plans of bargaining unit employees, including the future retirement benefits of current active employees, are mandatory subjects of bargaining to which the duty to bargain

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regarding its health insurance proposal. The Region dismissed the charge, finding that the parties were not at impasse and that the Union had directed the Employer's request to the plan trustee in a timely manner.

[5] On April 12, the Employer filed the instant unfair labor charge, alleging that the Union refused to provide relevant information and that the Union was insisting to impasse over a non-mandatory subject of bargaining. The Union has advised the Region of its intent to provide the requested information and that issue was not submitted for advice.

[6] Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 178 (1971). See also International Union of Operating Engineers Local No. 12 (Associated General Contractors of America, Inc.), 187 NLRB 430, 432 (1970) ("The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees").

applies.[7] These include multi-employer retirement plans and company-wide plans that involve both unit and nonunit employees.[8] In Amoco Chemical Co., for example, four employers, all Amoco companies, unilaterally changed current employees' retirement health and medical insurance benefits in various bargaining units at five facilities in three states.[9] The Board held that since the health insurance and medical benefit plans of active unit employees were mandatory subjects of bargaining, the employers violated Section 8(a)(5) by unilaterally implementing those changes.[10]

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[7] See Amoco Chemical Co., et al, 328 NLRB 1220, 1221, fn. 3 (1999), citing Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 180 (1971); Midwest Power Systems, Inc., 323 NLRB 404 (1997), remanded on other gds. (mem.), 159 F.3d 636 (D.C. Cir. 1998); United Hospital Medical Center, 317 NLRB 1279, 1282 (1995).

[8] See Hardesty Co., Inc., d/b/a Mid-Continent Concrete, 336 NLRB 258, 259 (2001) (employer violated Section 8(a)(5) by unilaterally changing bargaining unit employees' health insurance plan benefits. It is immaterial that the changes, a mandatory subject of bargaining, were companywide and as such involved both unit and nonunit employees); Keeler Brass Co., 327 NLRB 585, 588 (1999) (employer violated Sections 8(a)(3) and 8(a)(5) by unilaterally improving pension benefits at its two non-union plants, but not its newly unionized plant, because the employer-wide pension plan was a condition of employment and a mandatory subject of bargaining); Sheet Metal Workers' International Assn, 234 NLRB 1238, 1243, fn. 21 (1978), citing Inland Steel Co., 77 NLRB 1 (1948), enfd. 170 F.2d 247 (7th Cir. 1948), cert. den. 336 U.S. 960 (1971).

[9] 328 NLRB 1220. The changes included increasing from 65 to 80 the number of points (age plus years of service) that a current employee would have to obtain in order to receive full company support for medical insurance in retirement, and separating retirees into a separate pool for claims experience, with the result that current employees faced increased premium costs in retirement. Id. at 1221.

[10] 328 NLRB 1221. See also Carrier Corp., 319 NLRB 184 (1995) (conglomerate's merger of numerous retirement plans of its subsidiaries and divisions, including the employer's separate plan, was a mandatory subject because it affected the viability of the employer's plan); Sheet Metal Workers' International Assn, 234 NLRB at 1245 (the union did not unlawfully bargain to impasse over the number of trustees needed to effectively administer a multi-employer fringe

Applying the above principles, the Union Plan is a multi-employer plan of the type that the Board has consistently found to be a mandatory subject of bargaining. Further, a change from that plan to the Employer plan would directly and substantially affect the current and future benefits of active employees. Thus, for example, the Union Plan's dollar bank directly affects current employees because it allows them to save excess hours that they work and to draw upon them during times of need, such as current non-working periods like layoffs, or during retirement. Further, the Union Plan, in contrast to the Employer Plan, retains the future retirement benefits of current employees, who have "an obvious direct interest in their future retirement benefits as an integral part of their compensation package."[11] Nor, moreover, does the Employer allege that the parties ever bargained specifically about the health benefits of retirees, rather than those of active employees. In any event, so long as a bargaining subject "settles an aspect of the relationship between the employer and employees," the fact that it also affects nonunit employees does not turn it into a permissive subject.[12] Here, as in all multi-employer plans, the

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benefit plan because it was a mandatory subject of bargaining. The Board noted that "the widespread acceptance of multiemployer benefit and pension trust funds . . . is reflective of the fact that collective bargaining over such plans . . . has successfully accommodated the various interests of the parties" and is a mandatory subject).

[11] Midwest Power Systems, Inc., 323 NLRB at 407.

[12] See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. at 178. See also Regal Cinemas, 334 NLRB 304, 305 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003) (employer lawfully insisted that permanently laid-off employees sign releases waiving their right to sue as a condition of receiving severance pay: although general releases are typically a permissive subject, these were proposed as a quid pro quo for severance pay and thus so intertwined with employees' terms and conditions of employment that they became a mandatory subject). Compare Lewis Tree Service, 244 NLRB 124, 128 (1979) (union, which represented the employees of two subcontractors doing the same work for the contractor on that property, unlawfully insisted on a definition of seniority that expanded the boundaries of the bargaining unit from one limited to the employer's employees, to one that included the employees of all employers engaged in the same work on the contractor's property).

contributions of other employers subsidize the insurance of the employees of this Employer, just as the Employer's contributions subsidize the insurance of nonunit employees. As the Board has noted, if "a multiemployer fringe benefit plan can usually operate in a more efficient and financially secure manner than an individual single-employer plan, then certainly the [r]espondents are privileged to bargain to impasse over such a plan."[13]

Accordingly, the Region should dismiss the charges, absent withdrawal.

B.J.K.

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[13] Sheet Metal Workers' International Assn, 234 NLRB at 1244.